

N. WARNER LEE, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

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DEPARTMENT OF LAW LETTER OPINION NO. 74-39 (7-67)

REQUESTED BY: JACK G. KITCHENER
Secretary
Arizona State Board of
Funeral Directors and Embalmers

QUESTION: May the following practices be engaged in without the supervision of either a certificated embalmer or a certificated funeral director and without a funeral establishment license:

1. Transportation of bodies after death to a repository;
2. Maintenance of such bodies at the repository at a temperature not above 32° Fahrenheit while awaiting transportation to a crematory;
3. Transportation to a crematory;
4. Disposition of the cremated remains?

ANSWER: See body of opinion.

The questions presented are: (1) whether or not any or all of such practices should be engaged in ONLY with the supervision of either a certificated embalmer or a certificated funeral director, or both, and (2) whether or not the repository constitutes a funeral establishment.

Arizona's Legislature has defined the expressions "embalming", "funeral directing" and "funeral establishment" as follows:

§ 32-1301. Definitions

In this chapter, unless the context otherwise requires:

* * *

5. "Embalming" means the disinfection, preservation or attempted disinfection or preservation of a dead human body.

6. "Funeral directing" means the business or profession, for profit, of disposing of dead human bodies, or of maintaining a funeral establishment.

* * *

8. "Funeral establishment" means a business at a specific location devoted exclusively to the care and preparation for burial or transportation of dead human bodies.

Further, Arizona's Legislature has declared that it is unlawful, without authority from the Board of Funeral Directors and Embalmers, to either (1) practice the business of funeral directing, (2) practice the art of embalming or (3) operate a funeral establishment.

We are fortunate to have the benefit of guidance from Arizona's Supreme Court with respect to the purposes for various of the regulatory schemes enforced by the Board of Funeral Directors and Embalmers. Quoted hereinafter are excerpts from the Supreme Court of Arizona's written opinion in McKinley v. Reilly, 96 Ariz. 176, 393 P.2d 268 (1964):

EMBALMERS

By A.R.S. § 32-1301, an embalmer is a person engaged in the art of disinfecting or preserving dead human bodies and preparing them for transportation. . . . The preparation for burial of the human remains involves proficiency in the fields of anatomy, chemistry, and bacteriology and the like.

The sciences of bacteriology and pathology and others allied with the prevention of the spread of infectious disease have advanced immeasurably during the past fifty years. Those who die from contagious and infectious disease may pass through the hands of an embalmer in preparation for disposal. A high degree of skill and knowledge in sanitation and hygiene must be possessed by an embalmer in order to prevent the transmission to or infection by others.

We take judicial notice that in the Great Plains area of the Western States and especially in Arizona the temperature during most of the year is such that dead bodies will rapidly decompose and disintegrate and that hence it is the common practice to embalm bodies in order to preserve them for services and later burial. The Arizona State Department of Health, by Rules and Regulations, Vital Statistics, Article 5, Part I, Regulation 3, recognizes the problem in forbidding the holding of any human body more than forty-eight hours after death unless it is embalmed or kept at a temperature below 32 degrees.

It is made a crime and unlawful by A.R.S. § 32-1368 for an embalmer, having knowledge of the fact sufficient to raise a suspicion of a crime related to the cause of death, to embalm a dead human body without permission of a coroner. The State here has imposed upon the embalmers an obligation to recognize and understand matters of fact concerning causes of death and criminal responsibility therefor.

The legislature had decided that embalming is not a business which should be entered into without substantial preparation nor is it one in which the uninformed or ill-trained should engage. . . .

FUNERAL DIRECTING

By A.R.S. § 32-1321, those desiring to engage in the business of funeral directing must first procure from the State Board of Funeral Directors and Embalmers a certificate of qualification. A funeral director in Arizona is a person engaged in the management of a funeral establishment. The business of funeral directing is the business or profession of disposing of dead human bodies. A funeral director, therefore, is the person responsible for the supervision and operation of a business disposing of dead human bodies.

. . . .

* * *

Funeral directing partakes more of the characteristics of a profession than that of carrying on a commercial business activity. The public in dealing with funeral directors must, because of the nature of the business, repose absolute confidence in them for it has neither the means nor skill by which to judge whether the funeral directors have completely fulfilled their part of the bargain. Hence the public meets the funeral director on an unequal basis and if he is not competent to properly direct the work of his employees the public will suffer accordingly.

* * *

We think that the statute A.R.S. § 32-1330 is designed to compel the funeral director to be more concerned with the proper preparation of the human body for disposal and less concerned with the amenities of the funeral service. . . .

On the basis of the language employed by the Supreme Court of Arizona in McKinley, supra, and additionally on the basis of a plain reading of the applicable definitions in A.R.S. § 32-1301 (quoted supra), it is our opinion that (1) maintenance at a repository of a dead human body at a temperature not above 32° Fahrenheit while awaiting transportation to a crematory constitutes the "preservation of a dead human body" within the meaning of A.R.S. § 32-1301 and, accordingly, constitutes "embalming", (2) the above described repository constitutes a funeral establishment, and (3) the practices described hereinabove constitute the "disposing of dead human bodies" within the meaning of A.R.S. § 32-1301 and, accordingly, constitute "funeral directing".

We are informed that excluded from the practices engaged in are:

1. Use of oils and other chemical preparations to disinfect or otherwise preserve dead human bodies.
2. Employment of cosmetology procedures.

3. Sale of caskets.
4. Provision of limousine service.
5. Rendition of "conventional"
ceremonial services.

And we have considered the argument to the effect that since the subject operation differs in many respects from the operations conventionally engaged in by the presently-licensed funeral establishments, it would be unreasonable to expect such an operation to be governed by the same statutes and rules and regulations with respect to which the presently-licensed funeral establishments are responsible to comply.

We are not persuaded by that argument. The subject operation involves the preservation, preparation for transportation and disposing of dead human bodies. As confirmed by Arizona's Supreme Court in McKinley, supra, Arizona's Legislature has expressed its intention that such practices are so affected with the public interest that they are subjected to regulation and control by the State of Arizona.

Notwithstanding the many differences between the subject operations and the operations of presently-licensed funeral establishments, the similarities (i.e., preservation, preparation for transportation and disposing of dead human bodies) compel exercise by the Board of Funeral Directors and Embalmers of its regulatory responsibilities in connection with the above described operations.

Respectfully submitted,



N. WARNER LEE
The Attorney General

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